

2                   , Inc. as a village Native corporation en-  
3     titled to participate in the Afognak joint venture. I refer  
4     Your Honor to 94 Stat. 2371 at 2518 through 28. We're speci-  
5     fically listed, so we've been ratified by the U.S. Congress.

6             Your Honor, there is no basis in law or fact to  
7     issue a preliminary injunction here, and I'm going to turn  
8     this over to Edgar Paul Boyko who will further expand upon  
9     that. Thank you, Your Honor.

10            THE COURT: Thank you, counsel. Mr. Boyko?

11            MR. BOYKO: Please the Court and distinguished  
12     counsel. I am not going to respond to Mr. Schneider's rather  
13     colorful jury argument, but I would allow there -- like to  
14     address this Court on the issue of legal and equitable con-  
15     siderations, and particularly on the issue of public policy  
16     which Mr. Stratman waves as a banner in his attempt at the  
17     1995 equivalent of the great train robbery, and I'm borrowing  
18     from my distinguished colleague in terms of similes here.

19            The public interest, Your Honor, is indeed involved  
20     in this case. And I say this with some feeling because as  
21     Your Honor knows, I was one of the handmaidens or midwives  
22     that brought into being the Alaska Native Claims Settlement  
23     Act which Congress fortified by declarations of policy which  
24     stress the importance of settling Native claims, land claims  
25     in Alaska, once and for all and with certainty and stability.

          As Your Honor may recall when I was sworn into

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1 office as the Attorney General of the state, the entire state  
2 was covered by overlapping aboriginal land claims. And I've  
3 litigated before Your Honor the case against Secretary Udall  
4 who had imposed a land freeze which brought basically the --  
5 the State of Alaska to a screeching halt, and Your Honor made  
6 a correct ruling that he had no legal authority to do so and  
7 the Ninth Circuit says, well, yeah, but there's legislation  
8 pending, so I think it's premature to -- to do that.

9 I have often been tempted to say to a court in a --  
10 let's say, a drug case, well, there's legislation pending to  
11 decriminalize marijuana so let's not prosecute anybody. I  
12 don't think the Ninth Circuit was right that time, I think  
13 you were right, but in any event, Congress settled that issue  
14 with the Alaska Native Claims Settlement Act.

15 And now twenty years later comes Mr. Stratman and  
16 says I want to unravel the fabric of the Alaska Native Claims  
17 Settlement Act, the distribution of lands, the allocation of  
18 -- of resources in an entire region the -- involving the --  
19 the Koniag Region, basically, because I represent the public  
20 interest. Well, we know from the record in this case what  
21 Mr. Stratman means when he talks about the public interest;  
22 he's talking about -- what was it, eighteen thousand acres  
23 that he wanted and I don't know how many dollars? And I am  
24 sure if this -- if he succeeds in this raid and gets an in-  
25 junction with a nominal bond, that his new demand will be

1 much higher than that, and that he will be able -- thinks  
2 he'll be able to extort from this Native village corporation  
3 more land and more money for himself, not for the public.

4 The public interest demands that this vixacious  
5 litigation be terminated once and for all, and there is  
6 nothing in the recent decision of the Ninth Circuit that  
7 precludes you from doing that on the merits. All it said is  
8 that he has a right to go back to square one and litigate the  
9 merits of his claim as a recreational user who wants to vin-  
10 dicate his -- his position as to the -- the validity of the  
11 original certification. Doesn't direct this Court to find  
12 for him on it; it simply says the fact that there was this  
13 settlement which blew up for one reason or another, doesn't  
14 bar him from continuing his litigation, but this Court is --  
15 is -- is invited to look at the issue of adminis -- of ex-  
16 hausting administrative remedies.

17 And Mr. Fitzgerald has very cogently stated to the  
18 Court how on several occasions he failed to pursue his admin-  
19 istrative remedies, he failed to -- he failed to -- to appeal  
20 from final judgments -- a -- a final judgment of this Court,  
21 he lost in the Alaska Supreme Court, he lost here, he lost  
22 before the -- the Bureau of Indian Affairs Appeals Board, he  
23 lost before the ANCSA Appeals Board, and he's back for more.

24 And for the first time in twenty years, he wants  
25 not only to -- to be -- continuing litigating, but he wants

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1 to shut his opponents down. He wants to cut off their one  
2 and only source of revenue, he wants to -- to tie up their --  
3 their funds. He already has a lis pendens filed on all their  
4 land. He wants to have them gagged, bound and helpless, and  
5 then cut them up for his own benefit, and he is claiming to  
6 do that in the name of the United States Government, which is  
7 on the other side from him in this litigation.

8 I -- I -- I guess if you -- if you make a claim  
9 outrageous enough, that you can get a hearing, whereas if --  
10 you know, if it was a little less crazy, maybe it'd be  
11 laughed out of court. I -- I sincerely hope that this Court  
12 will not be seduced into -- into granting a preliminary in-  
13 junction on this state of the case.

14 If -- if he real -- if it's really true that there  
15 are some irreparable harm done from continuing rational,  
16 government-permitted and regulated logging operations that  
17 have been going on for years -- if that's really such a dan-  
18 ger, then the remedy is not to grant a preliminary injunc-  
19 tion, but simply to set this case for an early trial and, by  
20 golly, if he then prevails, he can have whatever he wants.  
21 But not at this moment to disarm and -- and force into bank-  
22 ruptcy one of the parties of this litigation on -- on these  
23 wild claims which have no substance in law or equity, and  
24 which we have demonstrated clearly do not have substance and  
25 which -- to which there has been no response in either the

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1 pleadings or the oral argument thus far. And I'm waiting  
2 with bated breath what's going to happen in the next fifteen  
3 minutes.

4 But in any event, should Your Honor consider, and I  
5 -- I sincerely hope and pray that you will not, issuing a  
6 preliminary injunction, when it comes to the issue of the  
7 bond, clearly there needs to be a determination of the facts  
8 as to what the economic impact will be on this defendant  
9 corporation. That was not a proper time to do at this ac-  
10 celerated consideration of the merits. If Your Honor even  
11 would consider, we would like to have an opportunity to sub-  
12 mit to you economic data to show how this would bankrupt us  
13 and cause irreparable harm to Leisnoi.

14 THE COURT: Would you conclude your argu -- your  
15 argument now, counsel, please?

16 MR. BOYKO: Yes, sir. Mr. -- let me say one last  
17 thing that Mr. Fitzgerald pointed out, and it's in the brief  
18 so forgive me for repeating it.

19 What Mr. Stratman has not addressed is that even if  
20 he were to prevail somehow on this decertification issue, the  
21 -- the Leisnoi Corporation would still keep the land and the  
22 government has agreed to that. It would still be private  
23 land, it would still be subject to their rational use and --  
24 and disposal. So there is no way that he can accomplish at  
25 the end what he seeks to do in some kind of preliminary,

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1 extraordinary remedy, hoping to kind of slide it by and --  
2 and strike a blow that will force us to the bargaining table.  
3 I hope Your Honor will see through that and rule accordingly.

4 THE COURT: Thank you. Mr. Middleton?

5 DEFENDANT KONIAG, INC.'S ARGUMENT

6 MR. MIDDLETON: Thank you, Your Honor. Your Honor,  
7 I'm only here for the issue that Mr. Schneider rise -- raises  
8 on the 1990 agreement with Mr. Stratman. He has made the  
9 motion that the caption should be cleaned up and Koniag dis-  
10 missed. I have -- we -- we posed and I -- I have -- I have  
11 finally put into the Court a supplemental memorandum with an  
12 affidavit. The -- the purpose behind the supplemental  
13 affidavit was it was becoming apparent that Mr. Schneider --  
14 or Mr. sna -- Stratman's motion perhaps was going to an abso-  
15 lute dismissal of Koniag based upon the 1990 agreement with  
16 Mr. Stratman. Let me point out a couple of things to the  
17 Court.

18 First, the Court has never -- this Court has never  
19 ruled on what the meaning of that 1990 agreement is, the  
20 Ninth Circuit never ruled on what the meaning of that 1990  
21 agreement was, either. There is a cryptic comment in the  
22 Ninth Circuit opinion which has been quoted to you, and I'm  
23 sure will be again, of -- in all of the briefing. It's under  
24 a heading called indispensable party and it indicates that  
25 Koniag may apparently be dis -- have to be dismissed because

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1 of the agreement. There's nothing which prevents an indis-  
2 pensable party from being -- from settling with a -- with a  
3 -- another party during the pendency of the litigation.

4 The meaning of the 1990 agreement has never been  
5 judicially determined by this Court or by any court. In --  
6 in giving you a supplemental memorandum and an affidavit, I'm  
7 seeking to show factually what I believe that that 1990  
8 agreement called for, and what it called for, I believe, is  
9 that Mr. Stratman was never to reopen this litigation or  
10 affect Koniag's interest which he knew about in 1990; the  
11 interest being in the subsurface estate of all lands which  
12 Koniag -- or which Leisnoi has.

13 The determination of this Court -- the only deter-  
14 mination this Court has made about the standing of Koniag in  
15 this litigation was that it was a necessary party. The only  
16 determination -- even if you read the Ninth Circuit opinion  
17 was referring somehow or another, though it never says so, to  
18 the 1990 settlement agreement between Koniag and -- and Mr.  
19 Stratman as requiring -- excuse me -- holds that Koniag may  
20 not be an indispensable party. There's a clear difference  
21 between a necessary party and indispensable party.

22 One of the things which Mr. Stratman at this point  
23 is trying to tell the Court in this motion -- which, by the  
24 way, has -- it cites us to no rule or no -- nor do I have any  
25 -- is it apparent under what rule it is that Koniag's dismis-

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1 sal is sought -- is this a 12(b) motion to dismiss? Is it a  
2 56(f) motion to dismiss?

3 The -- what -- what Mr. Stratman is apparently  
4 indicating in this motion is that even though he has settled  
5 with Koniag, even though he has settled and said that he  
6 would not bring this litigation and he's not going to con --  
7 he's not going to live up to his part of the bargain, Koniag  
8 nonetheless is precluded from both defending this litigation  
9 and defending its interests -- it's subsurface interest in  
10 all of the lands which is sought to be -- which the complaint  
11 at least seek -- seeks to have returned to the United States  
12 or to Mr. Stratman or someone.

13 Not only does -- not only does he say that Koniag  
14 shouldn't defend those particular interests, but also he says  
15 that Koniag really shouldn't defend the interest that it has  
16 in the bargain that it reached with Mr. Stratman. Clearly,  
17 our bargain, as far as we are concerned, is that he was never  
18 going to bring this. Clearly, this is a place where -- this  
19 is the proper place to -- to bring that, and this is the  
20 proper court to request enforcement of that agreement.

21 But mostly what I'm here to say is that this is not  
22 the proper place to determine what the meanings and the para-  
23 meters of that agreement really are. When I said that this  
24 is presented to you in -- in the form of a let's-clean-up-  
25 the-caption motion, what I -- what I'm indicating to you is

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1 that there are substantial issues, factual issues and other  
2 issues, which need to be resolved, and this is not the proper  
3 place to do so.

4 The Ninth Circuit opinion does not require the  
5 dismissal of Koniag, it doesn't say so, it doesn't talk about  
6 the 1990 agreement, it does not indicate that Koniag's posi-  
7 tion in this litigation as a necessary party, it mentions  
8 nothing about that. And for those reasons, I oppose having  
9 Koniag stricken from the -- being a -- a participant in this  
10 -- in this litigation. We've been a participant in this  
11 litigation, obviously, since 1976 when it was first formed  
12 ~~and filed before the Court~~ and will continue to be so. We  
13 will amend the complaint to allege that Mr. Stratman has  
14 violated the terms of the agreement, this is a -- and that  
15 the litigation should not go forward. And -- and we have  
16 presented extrinsic evidence in the form of Mr. Gross' affi-  
17 davit to indicate that that's exactly what we felt that that  
18 -- that decision -- or excuse me -- that agreement stated.

19 I had also placed in the memorandum a suggestion  
20 that a Rule 16 conference might be of use to determine the  
21 order of things and the way this litigation should proceed.  
22 There's been a great flurry of memoranda back and forth and  
23 motions to discover and so on and so forth since the Ninth  
24 Circuit ruled. And certainly, the salutary effects of Rule  
25 16 are to try to straighten the litigation up so that we know

2 should proceed; they're clearly threshold  
3 issues.

4 What the -- the mandate from the 1982 Ninth Circuit  
5 requests that the Court, for instance, make a (indiscernible)  
6 determination as to whether or not Mr. Stratman should have  
7 exhausted his remedies. I don't want to -- I -- I -- I don't  
8 want to characterize exactly what the Ninth Circuit said. I  
9 think it says those terms -- clearly, there -- that's an  
10 issue that the Court should look at.

11 Clearly, also another issue for the Court to deter-  
12 mine was in 1982 there was a -- a request pending by the  
13 United States to have the matter sent back to the -- I sup-  
14 pose Interior Board of Land Appeals or ANCAB, whatever --  
15 whichever of those two organizations. Clearly, that's some-  
16 thing which the Court should consider.

17 In any event, we strongly oppose the Court consi-  
18 dering it without Koniag being present. Unless the Court has  
19 other questions.

20 THE COURT: All right. Thank you. Mr. Landon?

21 **DEFENDANT UNITED STATES' ARGUMENT**

22 MR. LANDON: Morning, Your Honor. I just have four  
23 brief points.

24 The first, of course, is that no relief is sought  
25 against the United States, so we're really rather peripher-  
ally involved in this injunction motion. However, I did want

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1 to clarify because in much of the argument this morning, it  
2 seemed as if Mr. Stratman was presuming to speak in the name  
3 of the United States; that we do not join in the motion.

4 We have said previously in our filings in this case  
5 that eve -- that it is our belief that even if Leisnoi were  
6 decertified, that they would still have existence as a state  
7 law corporation and that the United States would be barred by  
8 1166 of Title 43 of the U.S. Code from regaining the land, and  
9 we also believe that our -- any false claims or fraud act  
10 claims that we have -- would have had against Leisnoi are now  
11 ba -- now barred by the statute of limitations.

12 So that in -- in focusing on the harm here, there  
13 seems to be an assumption that if Leisnoi was improperly  
14 certified, the plaintiff is entitled to the relief he -- he  
15 seeks. We don't think that were they decertified, that would  
16 be the result. In addition --

17 THE COURT: Wait -- wait a minute.

18 MR. LANDON: Yes, sir.

19 THE COURT: Does -- does the Government oppose the  
20 motion for preliminary injunction? I assume you do from what  
21 you say.

22 MR. LANDON: I don't -- I don't know whether we can  
23 oppose a motion against which no relief has been asked  
24 against us, but we do not believe its well taken.

25 THE COURT: All right. Go ahead.

1 MR. LANDON: And I also notice that there seem to  
2 be a discussion today that Mr. Stratman was representing the  
3 possible interest of the state or another Native corporation  
4 which he posits might get the land were the land to go out of  
5 Leisnoi's ownership. And of course, in a preliminary injunc-  
6 tion motion, the harm to be considered is the harm to the  
7 plaintiff. Plaintiff cannot use the putative harms the third  
8 parties to -- if -- if the state is concerned about timbering  
9 on these lands, it should be the Office of the Attorney Gen-  
10 eral of the State of Alaska here asking you to shut down the  
11 operations.

12 And in the briefing, I was concerned there. In  
13 plaintiff's reply brief, there was a -- a discussion which  
14 suggested that the village eligibility provision on the act  
15 of God and act of government was illegal -- invalid under the  
16 statute. There is, of course, a presumption of the validity  
17 of regulations. It is my understanding that quite a number  
18 of villages were certified under that provision, and -- and I  
19 urge the Court to exercise some caution in approaching that  
20 -- that issue.

21 Finally, I -- I would like to strongly support the  
22 suggestion of Koniag that the Court hold a -- a status con-  
23 ference rather soon. It seems hardly a day goes by that I  
24 don't get a -- a new motion delivered to me, and I think had  
25 it not been for your stay order, there would be a lot more

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1 motions already before the Court. It does seem to me that  
2 there are some threshold issues.

3 If there is to be a determination of eligibility  
4 and these threshold issues do not preclude Mr. Stratman's  
5 claim, it's the Government's view that the proper thing for  
6 the Court to do would be to remand the case to the IBLA for  
7 initial determination of the eligibility of -- of Leisnoi  
8 because that was -- there never was an administrative appeal  
9 on that issue. There was the initial decision, but there was  
10 never -- that was never looked at by the agency in one of the  
11 administrative appeal tribunals in the Interior Department.

12 I would suggest that the conference would be most  
13 useful if prior to the conference each of the parties were  
14 asked to submit maybe a five-page paper to suggest what sort  
15 of motions they foresee coming up and their suggestions on  
16 which would be the most rational way to approach those. I --  
17 I do think that this is one of the most procedurally complex  
18 cases that I've ever dealt with and I think that the -- all  
19 parties and the Court would benefit from an early status  
20 conference. Thank you, Your Honor.

21 THE COURT: All right. Thank you. Mr. Schneider,  
22 you have the right of rebuttal.

23 **PLAINTIFF STRATMAN'S REBUTTAL ARGUMENT**

24 MR. SCHNEIDER: I think you have about eighteen  
25 minutes, Judge, and I'm going to try not to use them.

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44  
The U.S.'s position. Let's remember these are the  
2 same folks that gave away the farm here to a non-existent  
3 village with no investigation, and now they want to cover  
4 that up. They don't want the light of day to shine on the  
5 Secretary's malfeasance here. Instead, they want to say,  
6 hey, we just -- you know, statute of limitations and all that  
7 happy stuff, Mr. Stratman can't get where he's going. There  
8 is nothing in 43 U.S.C. 1166 that should bar this claim --  
9 nothing. That's for folks that show up late. We sued these  
10 people about this problem before they got conveyance of the  
11 land.

12 We don't care if Leisnoi keeps its state law certi-  
13 ficate; that's fine with us. We just want to get all their  
14 land and all their money. And, yes, it's true, we want to  
15 shut them down, we want to take them off the map. That's the  
16 object of our endeavor. That's the only endeavor we're al-  
17 lowed under the state of the pleadings right now; that's it.

18 While it is suggested that it's harm to the plain-  
19 tiff that -- that Your Honor ought to consider in granting or  
20 denying our request, that only flies where the plaintiff has  
21 a direct economic interest. We wish we did -- we don't. We  
22 just don't.

23 Your Honor's seen -- seen me get a contingency fee  
24 of zero before, you know it's a possibility.

25 THE COURT: Oh, I remember a few months ago --

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MR. SCHNEIDER: Yeah. I'd like to forget. I  
2 can't. We've got a right to do what we're doing --

3 THE COURT: Wait a minute. The Government's dis-  
4 avowing you, in effect. Mr. Landon --

5 MR. SCHNEIDER: Well, of course, they're disallow-  
6 ing us, Your Honor.

7 THE COURT: No, I didn't say allowing, avowing.

8 MR. SCHNEIDER: Disavowing our efforts? I agree.  
9 They are disavowing our efforts. Let's -- let's look at the  
10 only analogy I can -- I can really give to the Court that's  
11 out there, that's definite, that's got a few cases on it  
12 because this is -- this is an extremely unusual case. If we  
13 look at the False Claims Act setting, bounty hunter statute,  
14 okay? In that setting, the government has a right to come in  
15 and disavow. Usually, they do.

16 The keytam (ph) relater stands up, says I have a  
17 claim, the government has so much time to say yes or no, they  
18 usually say no, you know, bounty hunter goes on his separate  
19 way, brings back scalp, gets a slice of the pie; that's the  
20 way it works. Here, the government is disallow -- disavowing  
21 our position; we don't think he can get there, we're not  
22 really a party to the motion, we'd kind of like not to see  
23 this happen. That doesn't solve the problem because the  
24 irreparable harm is there, the probability of success on the  
25 merits is there, these technical defenses --- and, boy, tech-

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2 that this village thing under ANCSA is smoke and they just  
3 can't get there, so they've got to talk about technical de-  
4 fenses, and Your Honor knows that the law on that is very  
5 clear -- you don't resolve those at this hearing. You don't.  
6 If you want to fight about those later, we fight about them  
7 later, but we don't resolve those things at this hearing.

8 At this hearing, you have a couple of horses with  
9 four legs, you have some irreparable harm to the only inter-  
10 est that will be served if the lawsuit is successful, and  
11 that's not Omar Stratman's, and if -- and if it's there, we  
12 should get that injunction. Where is the record? I mean, we  
13 -- after -- you know, sure, we filed our pleadings quite  
14 awhile ago. These folks have known this injunction motion  
15 was coming from December, and what have they done about it?  
16 You've got nothing in the record saying they're going to be  
17 hurt. You've got some smoke, you've got no fire; there's  
18 nothing in the record. The extent of the harm, none of that  
19 stuff.

20 And if there is and this balancing act -- we've got  
21 this in our brief and I'm not going to belabor it -- but  
22 where the public interest is really the only interest at  
23 stake, then they've got to show an awful lot of harm. How  
24 can they do it when they get to keep the trees and cut them  
25 down later? On the law and the facts, we ought to get this

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1 injunction, the bond should be nominal because Mr. Stratman  
2 has no direct economic interest. He'd love to have one,  
3 doesn't have one; can't get there from here.

4 The government interest, Your Honor, here is to  
5 find by the Alaska Native Claims Settlement Act. Nothing in  
6 this case will change the fixed pie of benefits provided in  
7 that act; will not change, can't change it -- can't change  
8 it. What it can do though -- what this case can do is make  
9 the government, who seemed to be fairly generous back here  
10 when Mr. Fitzpatrick was wandering around in the wind and the  
11 rain and didn't want to look at the island too hard, and it  
12 -- make them give those benefits to Native groups that are  
13 entitled to those benefits. How is that not in the public  
14 interest?

15 And it's not in the public interest -- it's not in  
16 the public interest to put the lid on Mr. Stratman just be-  
17 cause the government's a little embarrassed about the way  
18 they've handled this thing to date. Your Honor, spe -- Your  
19 Honor --

20 THE COURT: You really hang your hat basically on  
21 the public interest question now, don't you?

22 MR. SCHNEIDER: On the bond issue, I think we have  
23 to; on anything else, I don't think we have to. But on the  
24 bond issue, we have to be viewed as public interest liti-  
25 gants. The Court has to say what are our -- what could we do

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1 here -- you know, one of the problems is -- we have a  
2 chance to amend the complaint, but if we did, what could we  
3 claim? Could Mr. Stratman, if we wanted to -- if we made  
4 this -- if we made this motion a day before Christmas, what  
5 could Mr. Stratman get here? And the answer is zip. Your  
6 Honor said he has no economic claims, the Ninth Circuit has  
7 affirmed, he's been thrown out at the State Supreme Court  
8 level, he can't get there from here. If he was a keytam (ph)  
9 plaintiff where he could have an economic interest, then by  
10 definition -- by statutory definition, he is proceeding on  
11 behalf of the government and he would be entitled to this  
12 relief without bond.

13 So eith -- he's -- he either gets to be a keytam  
14 (ph) plaintiff and is entitled to the relief without bond as  
15 a matter of statutory construction, or you look at what this  
16 man could get under any conceivable theory and when you cut  
17 -- when the answer is zero, he's a public interest litigant.  
18 ANCSA itself defines, to use their words, alleged berry pick-  
19 ers, like Mr. Stratman, is having the standing, the ability,  
20 to challenge bogus Native village corporations, and that's  
21 what he's doing; that's all he's doing. He was part of a  
22 citizens' group, the rest of the citizens jumped ship, he's  
23 the only guy left.

24 THE COURT: This may be over-naive, but why -- why  
25 don't you have an adequate remedy at law?

1 MR. SCHNEIDER: I can -- I can explain that, Judge.  
2 A number of reasons. We settled with these guys, with Kon-  
3 iag, okay? Can't sue Koniag. However, if Koniag keeps fool-  
4 ing with this thing, stays in this case, submits many more  
5 affidavits, that could change. But right now, we settled  
6 with these people and so we can't sue Koniag yet. Probably  
7 can't sue Koniag unless they give us a couple more good affi-  
8 davits to play with.

9 Now we can't sue Leisnoi because we did sue Leis-  
10 noi. That -- all those claims have to be joined, they all  
11 when through the process, we got kicked out at the State  
12 Supreme Court level. I mean, we don't have any adequate  
13 remedy at law because we've reached the end of the trial with  
14 Leisnoi on our individual claims. The individual claims we  
15 tried to assert here Your Honor dismissed, the Ninth Circuit  
16 said right on, so we're out of bullets there, too.

17 THE COURT: Why isn't it better -- being the de-  
18 vil's advocate --

19 MR. SCHNEIDER: Please.

20 THE COURT: -- why isn't it better to just go ahead  
21 with the case as directed by the recent Ninth Circuit deci-  
22 sion and decide that -- those issues on the merits rather  
23 than get involved here with the kind of an injunction you  
24 seek?

25 MR. SCHNEIDER: Well, I'll tell you why that's not

1 better, Judge, is 'cause you can't take these two-hundred- to  
2 four-hundred-year-old trees, once they're cut down, and glue  
3 them back on the stumps. And you can't take the money from  
4 these two-hundred- to four-hundred-year-old trees once  
5 they've squandered it, and have it there as a potential  
6 source of recovery for the party, probably the U.S., but I  
7 don't care who it is, ultimately entitled.

8           You know, we've talked about what's in our com-  
9 plaint and what isn't in our complaint. Lots of stuff could  
10 be in our complaint once we get around to amending it. We  
11 could -- we could ask for a constructive trust, we could ask  
12 for all kinds of relief. Even if -- even if under this stat-  
13 ute that the government's so proud of, 43 U.S.C. 1166, even  
14 if we can't get the land back, we can get a judgment against  
15 these people, and we could get a judgment for somebody else.

16           And in the meantime, Your Honor, if Your Honor  
17 doesn't grant this injunction, you know what we're going to  
18 get at the end of this trail when we win? Zip. Because logs  
19 are going to be sold, the trees are going to be gone, and  
20 they're going to say, well, gosh, I guess we got the money,  
21 we got the logs, and we got our state certificate of incor-  
22 poration.

23           Well, they can keep the state certificate, but  
24 right now they shouldn't be allowed to cut down those trees,  
25 they shouldn't be allowed to spend the money, and Your Honor

ought to lock up every cent that is squandering from these  
operations. Why? Because the harm is irreparable by defini-  
tion, because we've got a lot more than a horse race on the  
merits, and because in the Ninth Circuit, when that happens,  
we ought to win.

THE COURT: Where does the money go if I lock it  
up?

MR. SCHNEIDER: I don't care where it goes. As  
long as it stays put --

THE COURT: Well, now wait. That's not an answer.

MR. SCHNEIDER: No, it isn't an answer. Let me --

THE COURT: Whose -- whose the --

MR. SCHNEIDER: Yes.

THE COURT: -- whose the court -- to what party is  
the Court going to direct the funds that have been impounded,  
shall we say --

MR. SCHNEIDER: Sure, sure.

THE COURT: -- go when we have -- assuming you're  
correct? Where --

MR. SCHNEIDER: Yes, let's assume --

THE COURT: Not -- not to Mr. Stratman, you know --

MR. SCHNEIDER: Negative. Ab -- absolutely --

THE COURT: Not to the government.

MR. SCHNEIDER: Wait, eh, eh, eh, eh, eh -- not to  
Mr. Stratman, and that's why we're public interest litigants.

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10 the government because it's the government from whence  
2 these benefits came, okay? What does the government have to  
3 do with that money then? First off, I'd suggest that's not  
4 really our problem, but let me -- let me answer the question  
5 directly.

6 The government tells us -- and by the way, I'm not  
7 inclined to believe these folks, okay? And we haven't  
8 briefed this issue and we haven't thought about it, but if  
9 you believe what they say, what they say is we would owe it  
10 to some other entitled Native group. And my answer then  
11 directly to Your Honor's question is it's got to go to the  
12 government first, they've got to give it to who they owe it  
13 to, okay? Somebody else can fight about that. But they've  
14 got to give it to people that are entitled to it, not people  
15 that are unentitled to it.

16 THE COURT: That sounds like litigation into the  
17 twenty-fourth century to me.

18 MR. SCHNEIDER: It may be, Your Honor, it may be,  
19 but my son has expressed an interest in law school, he's in  
20 the courtroom today, and anything is possible.

21 THE COURT: Okay.

22 MR. SCHNEIDER: Mr. Stratman assures me he has many  
23 young and healthy heirs.

24 MR. BOYKO: My son, Your Honor, graduates from law  
25 school on May the 21st.

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MR. SCHNEIDER: Mr. Boyko's ahead of me in that

2 regard.

3 Judge, ANCSA is a fixed pie. You know, everybody  
4 said that, it's true by definition. They gave the pie away  
5 to people that aren't entitled to it; the pie ought to go to  
6 people entitled to it. No, they don't want to get their  
7 hands on this pie because they know how it's going to look  
8 when we start opening that box of worms and seeing what was  
9 done and not done here. It's going to be really hard to  
10 explain why on an -- on an island where everybody knew there  
11 wasn't a village, somebody got the equivalent of a hundred  
12 and fifteen thousand two hundred acres of the best land in  
13 Alaska. But if we can get that back to the government, we  
14 don't much care what they do with it after that. They ought  
15 to give it to the people that are entitled, if you believe  
16 them.

17 If you don't believe them, then I suspect they may  
18 just be able to keep it whether they like it or not. But  
19 I'll tell you what, they may not like it. These poor folks  
20 living in Kodiak that like to take the kids out the road to  
21 go fishing in Rosalyn Creek would sure get a kick out of it.  
22 They'd like to be able to go and enjoy the Chiniak Peninsula  
23 with trees, not stumps; those people would think it's a great  
24 outcome.

25 So whether the government gets this stuff back and

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keeps it or whether the government gets it back and gives  
2 to people entitled to it, in either instance, I -- I -- in  
3 due respect, I'd suggest the Court's not just in a position  
4 to terminate this case because it might be long, difficult,  
5 unpleasant, and painful to Leisnoi. You know, we're not the  
6 ones that submitted --

7 THE COURT: I'm not suggesting that, counsel, but  
8 I'm suggesting that -- it seems -- it seems to me that --  
9 that we're going to end up in the bog somewhere on what the  
10 final result of all this has to be.

11 MR. SCHNEIDER: You're ab -- Your Honor, that pos-  
12 sibility under the law addressing permanent -- forgive me --  
13 preliminary injunctions is something we sort out as the pro-  
14 cess goes along, and you've got to save the trees in the  
15 meantime, save the choices in the meantime on this record  
16 with no evidence of harm, no reason to grant opening to brief  
17 the matter further, they've had months. They can sure get a  
18 lot of affidavits. Why can't they get one from somebody  
19 saying there's going to be a loss here? Maybe because there  
20 isn't one, maybe because they've got deals that protect them,  
21 I don't know, but I know that the record isn't here.

22 And I know that if we take all this stuff -- you  
23 know, they've got fifty-some-thousand acres. We take it away  
24 from them, somebody's going to want it, somebody's going to  
25 be entitled to it. Won't be us, but it will be -- it will be

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1 those governments, individuals, or entities defined by the  
2 U.S. Congress to be the appropriate recipients of this land,  
3 not a non-existent village corporation that flimflammed its  
4 way into fifty-three thousand acres of Kodiak Island and  
5 hundreds of thousand of bucks worth of ANCSA cash. And just  
6 the fact that that'll -- there will be an empty bag at the  
7 end ought to be enough for the Court to grant this in-  
8 junction. It's an injunction, it's not a prejudgment attach-  
9 ment.

10 Does your -- do your -- does Your Honor have other  
11 questions that you'd like me to address? Because if you do,  
12 I will attempt to, and if you don't, I'll just sit down.

13 THE COURT: Well, just briefly. Mr. Fitzgerald  
14 dwelled to some --

15 MR. SCHNEIDER: Sure.

16 THE COURT: -- extent on this question of whether  
17 or not the -- what's involved are public lands or not.

18 MR. SCHNEIDER: Yeah, and I think that's a good  
19 question, and here's the answer to it.

20 They're not public lands in this sense: When you  
21 go down to the title -- you know, Leisnoi's a private outfit,  
22 Leisnoi owns title. Are they public lands? Heck no. That's  
23 what this lawsuit's about. When we get down to winning this  
24 lawsuit, they'll certainly be public lands.

25 We -- the -- the public interest -- see, in each

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1 one of these situations that we have cited in our brief,  
2 there's a statute that allows a private person to stand up  
3 and say, hey, wait, okay? Same sort of thing exists in  
4 ANCSA. In ANCSA, private people, upon consideration of a  
5 village corporation, can have a right to go and say, hey,  
6 wait a minute, this isn't right, this shouldn't -- this out-  
7 fit shouldn't be a village. That's what we're doing here.  
8 It is a perfectly analogous situation.

9 I can't give the Court a situation on point because  
10 as Your Honor's figuring out, I'm sure this is going to be a  
11 unique case, thank goodness. It's a unique case, but, you  
12 know, that's right, these are private lands, but that's the  
13 problem, they shouldn't be private lands, they ought to be in  
14 the hands of the public, and then on to the private party  
15 entitled. And wouldn't that private party like to get them  
16 with the trees? You know, let's say they're supposed to go  
17 to some other Native --

18 THE COURT: Maybe they'd rather have the money.

19 MR. SCHNEIDER: Exactly why -- exactly --

20 THE COURT: Maybe they would.

21 MR. SCHNEIDER: -- exactly why Your Honor ought to  
22 lock up the funds here. So even though we -- you know, if  
23 you don't stop the logging. So at least the en -- the Native  
24 entity ultimately -- ultimately entitled to these assets gets  
25 something. I mean, they either get the logs or they get the

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1 money instead of saying, hey, you don't get either one.  
2 Sorry, we've cut down the logs; sorry, we've spent all the  
3 money; but we've got some nice grassland out here on the  
4 Chiniak Peninsula we'd like to give you like we should have  
5 given you back in 1980. Have a nice day.

6 If -- if the Court -- and by the way, Your Honor, I  
7 -- I think -- and I think we got some stuff -- we've got a  
8 lot of stuff in our brief, but I think we've got some stuff  
9 in our brief on this. If you just lock up the money, don't  
10 stop the logging, don't think we have to post -- I think that  
11 bond problem goes way down for us. So at a minimum, the  
12 Court ought to lock up the dough, but I don't think that's  
13 going to be a great solace to the parties ultimately entitled  
14 to this land who don't get that choice. Why should that  
15 choice not be their's?

16 THE COURT: Well, of course, you're correct if you  
17 win, ultimately.

18 MR. SCHNEIDER: Yeah, that's right. And I --

19 THE COURT: Who knows?

20 MR. SCHNEIDER: Well --

21 THE COURT: You know, I've been around here a lit-  
22 tle while and I've seen the -- the silliest case win and the  
23 best case lose.

24 MR. SCHNEIDER: Yeah, yeah, and I --

25 THE COURT: I mean to juries, of course.

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1 MR. SCHNEIDER: I hope Your Honor didn't take of-  
2 fense at my ready agreement to that suggestion based on some  
3 of the things in our past.

4 But -- but that's why the Ninth Circuit test --  
5 that's why the Ninth Circuit test, when you have irreparable  
6 harm, just requires a horse race. And like I said, two live  
7 horses, four legs a horse, that's all we need. We're much  
8 closer than that. In all of this smoke, Judge, did anybody  
9 -- you know, one more time -- did anybody point to the vil-  
10 lage, talk about twenty-five people? They're dead meat on  
11 that stuff. That's why they're -- they're off -- we're chas-  
12 ing fairies and dragons and all these technical defenses. I  
13 mean, if -- if anything, their opposition shows we've got a  
14 darn good chance of success on the merits.

15 THE COURT: Okay. All right.

16 MR. BOYKO: If it please the Court, you asked one  
17 question that I would like to give a one-sentence reply to,  
18 and that is if they win, the land and the trees still belong  
19 to a state corporation known as Leisnoi, Incorporated. So  
20 eventually, it still winds up with Leisnoi and so their but  
21 -- their whole argument falls flat on its face.

22 THE COURT: All right.

23 MR. SCHMITT: Your Honor? I'm here on behalf of  
24 Toni Burton, and we had filed that motion opposing having her  
25 removed as a party, and I -- just one comment from Mr.

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1 Schneider to -- Toni doesn't need to be here because the  
2 Court could direct could direct that planing -- or pleadings  
3 be sent. Well, if they weren't sent, Ms. Burton would lose  
4 her ability to ask the Court for relief if she's removed as a  
5 party. And I think that the brief adequately addresses the  
6 other points. We would ask that the Court keep her in or  
7 perhaps just direct Mr. Stratman to execute the lis pendens  
8 and the other parties to be prohibited from using that in any  
9 fashion in this litigation.

10 MR. SCHNEIDER: That's fine with us.

11 MR. SCHMITT: A real simple way to do it, but -- I  
12 mean, she would very much like to go home and get on with her  
13 life. She's settled with Leisnoi and settled with Koniag,  
14 claims against the United States are non-existent and claims  
15 against Mr. Stratman are non-existent, but we're -- we're  
16 very much a small fish in this big complicated pool here, and  
17 if the Court could use its power here to get the parties to  
18 get her out, we'd very much appreciate it.

19 THE COURT: Let her out?

20 MR. SCHMITT: Well, let her --

21 THE COURT: I'm not -- I didn't hear what you said.  
22 Let her out?

23 MR. SCHMITT: In as sense, yeah, let her out of  
24 this courtroom and -- and -- and out of this having to moni-  
25 tor the pleadings.

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1 THE COURT: Do you want her dismissed as a party?

2 MR. SCHMITT: Well, we don't want do unless we can  
3 have that -- the lis pendens executed with the agreement from  
4 the defendants that they aren't going to use it against Mr.  
5 Stratman. That's their concern as I mentioned in my opposi-  
6 tion. Without that, Ms. Strat -- Ms. Burton has to remain in  
7 here to make sure that her rights are not impaired in some  
8 fashion.

9 THE COURT: Thank you.

10 MR. FITZGERALD: Your Honor, may I address that  
11 limited point?

12 THE COURT: Go ahead.

13 MR. FITZGERALD: Thank you. It's fascinating that  
14 Stratman is willing to let Burton keep land that was conveyed  
15 from Leisnoi. Here he purports to speak on behalf of the  
16 government, but for his former co-hort in this frivolous  
17 litigation, he says, well, it's okay for that party to keep  
18 land that was originally conveyed to Leisnoi and then con-  
19 veyed to Burton. So I just make that -- that one point, Your  
20 Honor. If -- the lis pendens is there. If for some reason  
21 we were to lose the land, why would Burton be entitled to  
22 keep it? And the fact that Stratman says it's okay for my  
23 co-hort to keep the land, I just don't want Leisnoi to keep  
24 it, indicates he's not acting in the public interest. Thank  
25 you.

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1 THE COURT: All right. The motion is submitted.  
2 need to review my notes on what I've heard today. Counsel  
3 will receive notification in writing of the Court's decision.  
4 I do not anticipate a lengthy delay. We will adjourn till  
5 the call of the gavel.

6 THE CLERK: This Court is now adjourned subject to  
7 call of the gavel.

8 (Whereupon, the proceedings in the above-entitled matter  
9 were adjourned at 10:58 o'clock a.m.)  
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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Donna K. Chertkow  
Donna K. Chertkow, Transcriber

4/24/95  
Date

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